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VIRGINIA LAW REGISTER

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Our Supreme Court met on Wednesday, November 4, at Richmond, with a full docket to contend with. It was noted with regret that the distinguished President, Judge Keith, was absent, and it was with much concern that the bar heard of the illness from which his absence resulted. We hope that by the time this journal reaches its readers the learned President of the Court may have resumed his duties. We are glad to learn that at the time of our going to press all the indications point in this direction.

The November Term of the Supreme Court of Appeals.

On the first Opinion Day of the Court, November 12, thirty decisions were handed down, fifteen of which affirmed the lower court and fifteen reversed it; but a good many interesting cases were set down for argument. One of much interest, City Council of Alexandria *v.* Alexandria County, etc., has been argued and submitted. This involves the question of the annexation of most of the outlying territory of Alexandria County by the city of Alexandria. Judge Gordon, of the Nelson Circuit, in a very able opinion, declined to allow the extension, but an appeal was taken.

We note that the Court in the case of Commonwealth *v.* Hall, from the Circuit Court of Louisa County, declined to grant an appeal for the defendant, who was accused of the murder of her husband, convicted of murder, and given ten years in the penitentiary. As to the merits or demerits of this particular case we know nothing, but nothing has done more to advance the cause of justice and to aid in the prevention of crime than the manner in which the present Court has declined to grant appeals with the incident delay, except upon the strongest grounds.

The docket of the Court contains eight criminal cases, one State Corporation Commission case, two privilege cases and seventy-five civil cases.

Very few of the profession, we think, ever take time or thought in regard to the number of offenses which, under the Statute Law of Virginia, are punishable by death. A group of lawyers were discussing able by Death. the other day the wisdom or lack of wisdom displayed by the last Legislature in making murder of the first degree punishable by death, or in the discretion of the jury by confinement in the penitentiary for life. One of the lawyers present inquired how many of the profession knew that there were still in Virginia two offenses the only punishment for which is death, the jury having no discretion to find a less punishment. Not a single member of the group present could name these offenses and the lawyer who asked the question owned up to the fact that he himself had only discovered it the evening before. One of these offenses is treason, which under § 3658 of the Virginia Code is punishable by death without any alternative; the other offense punishable with death without any discretion on the part of the jury is the malicious burning in the night of the dwelling house of another, or any boat, vessel or river craft in which persons shall dwell, or any jail or prison. Under § 3695 of the Virginia Code this offense is punished by death, though if the jury find that at the time of the committing of the offense no person was in the dwelling house, the crime is punished by not more than ten nor less than five years, but it will be remarked that though every person in the house so burned at night may have escaped injury, the punishment remains death alone.

The offense of rape is punished by death or confinement in the penitentiary from five to twenty years.

Attempt at rape is punishable by death or confinement in the penitentiary from three to eighteen years.

The seizing, taking or securing any person with intent to extort money or pecuniary benefit is punished by death or from eight to eighteen years in the penitentiary.

Robbery by partial strangulation or suffocation or by striking, beating or other violence to the person, or by the threat or presenting of fire arms, is punishable by death or from eight to eighteen years confinement in the penitentiary.

Murder in the first degree, as before mentioned, is now pun-

ishable by death or at the discretion of the jury by confinement in the penitentiary for life.

Burglary may be punished by death or from five to eighteen years in the state penitentiary, and under § 3728d of the Virginia Code the malicious destruction in the night time in whole or in part of the dwelling house of another, or any hotel, asylum or other house in which persons shall dwell or lodge, or any boat or vessel or river craft in which persons shall dwell or lodge, or any jail or prison, by the use of dynamite, nitro-glycerine or other explosive substance, may be punished by death or confinement in the penitentiary for not less than ten nor more than eighteen years, but if no person be found in the house, etc., then the punishment is not less than five nor more than fifteen years in the penitentiary.

So it will be seen that there are now in the State of Virginia nine offenses which may be punished by death, two of which allow the jury no alternative.

A case of some interest to the State at large is that of Dalton Adding Machine Company *v.* State Corporation Commission,

213 Federal Reporter, page 889. This

Foreign Corporations company, a foreign corporation, did **Doing Business in Virginia—Kicking before Being Spurred.** not file copies of its charter, appoint an attorney to receive process or to obtain a certificate of authority to do

business in this State, as required by our law. The State Corporation Commission had taken no action against this company, and prior to any action the company filed a bill asking for an injunction against our State Corporation Commission. In this bill it was alleged that the Commission had threatened to begin suit or take proceedings against the Adding Machine Company on the ground that the company's method of transacting business brings it within the purview of the statute and that under the law it is required to take out a license and pay a license fee. The company contended that its business in Virginia was purely interstate in character, being carried on through a sales agent and his assistants located in Richmond, Va., whose powers are expressly limited to merely soliciting orders or proposals to purchase machines, which orders are taken on printed

blanks or forms furnished by the company, which forms contain the words "this order subject to approval of the company" and that the order amounts only to an offer or proposition to purchase a machine on the part of the prospective buyer. Such offers or proposals are sent by the solicitor or salesman to the home office of the company in Missouri for approval and acceptance and all checks and moneys collected in Virginia are forwarded to the home office in Missouri and commissions due the salesmen in Virginia are paid from the home office in Missouri as collections are received. In no case is title to a machine vested in the prospective purchaser until the contract has been accepted by the home office in Missouri and the money received there in full payment of such machine. The company attempted to enjoin the State Corporation Commission from taking any steps to make it comply with the Virginia law on the ground that any such action is in the nature of a hindrance or interference with interstate commerce. The Court held that the State Corporation Commission would not be enjoined in advance of proposed action on its part from taking proceedings to enforce the statute against a corporation claiming to be doing only an interstate business, since, to grant such relief, it would be necessary to determine in advance that the Commission would not give a corporation a fair and impartial hearing. We are informed that the case has been appealed to the Supreme Court of the United States.

This is the day of commissions: State and Interstate; and some wit has suggested that if the present rage for having a commission to regulate the affairs of the Nation **Government by Commission.** continues, it will not be long before we have commissions to govern our methods of eating, drinking, sleeping and wearing clothes. The last commission organized by the General Government is the Federal Trade Commission. The elaborate act establishing this commission goes into definitions: For instance "commerce" is defined by the act to mean "commerce among the several States or with foreign nations, or in any territory of the United States or in the District of Columbia, or between any such territory are another, or between any such territory and any State or foreign nation, or between the District of Columbia and any State or ter-

ritory or foreign nation." This seems perfectly clear; but when the act comes to define "Corporation," we must confess it seems to us to have in the definition language which the courts will have difficulty in construing. It says: "Corporation means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members."

The weakness of this definition lies in the fact that it expressly excepts "partnerships" and yet describes "any company or association incorporated or unincorporated without shares of capital stock * * * which is organized to carry on business for its own profit or that of its members." We cannot see any reason for the definition or exception in view of the fact that the Commission is given authority to prevent partnerships as well as persons or corporations from using "unfair methods of competition in commerce." What those "unfair methods" are, is left entirely to the discretion of the Commission (subject to review by the various circuit courts of appeals). We may expect a fruitful field of beneficent crops of litigation to be sown with the provisions of this act and we shall watch its operation with not little anxiety and with much interest.

For such we suppose we may call the act passed by the Congress last October. The two **Sherman-Clayton Act.** most important sections of the new act we give below. The first relates to Price Discrimination and is as follows:

Section 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a

monopoly in any line of commerce; *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

The second relates to Agreements for Exclusive Dealings in or Use of Commodities, and is as follows:

Section 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

We suppose that these two sections will have to run the gauntlet of the courts and new light will be thrown upon the old question of the "reasonableness" of contracts supposed to be in restraint of trade. We can also well imagine the worlds of learning which may revolve hereafter in the space of judicial decisions around that little word "substantially" in the second section.

Those who complain of "judge-made" law in the construction of statutes ought to consider carefully the necessity of having judicial minds in the draughting of statutes.

Mr. Charles T. Terry, president of the Conference on Uniform State Laws of the American Bar Association, at the last meeting

**Uniformity of Laws—
Uniformity of Judicial
Decisions—The Nego-
tiable Instruments**

**Act and the Effect
of Judicial Con-
struction Thereof.**

of the Association held in Washington in October, in speaking of the uniformity of laws, said very truly that the tendency to divergence in the decisions of the courts in interpreting laws is as pronounced as the tendency to enact divergent statutes. There can be no question that Mr. Terry spoke truly and we have grave doubts

if the remedy he proposed would amount to anything. He suggested that to every act passed with a view to make the law uniform in the various States a provision should be added as follows:

“This act shall be so interpreted and construed as to effect its general purposes to make uniform the law of those states which enact it.”

Mr. Terry and several other distinguished lawyers seemed to think that this would compel the courts to construe the particular portion of the uniform statutes which come before them in a way to make their decisions harmonize with the decisions of other States on the same point. We wish we could agree with Mr. Terry and his colleagues, but a review of the decisions of the courts construing the Negotiable Instruments Act does not give us much hope. This act is probably one of the best and most carefully drawn statutes which has emanated from the law-making body in many decades. It was thoroughly discussed, drafted and redrafted time and again before it became law, and every judge in the Union knew, or ought to have known, that its object was to promote uniformity amongst the several States upon a subject of equal interest and value to each. And yet the judges of the various States have destroyed the very object of the act and have ruled without comparing their decisions with the interpretation in other States, so that the effectiveness and usefulness of the act is seriously impaired. A lawyer in Maine—if the judges had attempted uniformity in their decisions upon this act—would have been able to advise his client what the law was in Colorado or Virginia in relation to negotiable paper. Now

he is almost as much in the dark as he ever was. Many very plain, direct and simple terms of the act have absolutely perished under judicial bombardment. We will give only one instance out of many.

Section 52 of the Negotiable Instruments Act defines a holder in due course as one who has taken the instrument under four conditions:

1. That it is complete and regular upon its face.
2. That he became holder before it was dishonored, etc.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or *defect in the title of the person negotiating it.*

Section 56 defines notice of an infirmity or *defect in the title* to be that the person to whom the note is negotiated must have had *actual notice* of the infirmity or defect, or knowledge of such facts that his action in taking it amounted to bad faith.

Section 55 makes the title of a negotiator defective only when he obtained the instrument by fraud, duress, etc., etc., or other unlawful means, or for an *illegal consideration*, etc., etc.; and.

Section 57 makes a holder in due course, i. e. under the terms of § 52, hold the instrument free from *any defect of title* of prior parties and free from defences available to prior parties amongst themselves and allows him to recover the full amount thereof against all parties liable thereto.

Now it seems to us that the Legislative intent in these sections is expressed in clear and unmistakable language. It establishes a just and proper rule which protects those who purchase commercial paper in good faith and without notice of infirmity. And yet there is considerable conflict in the decisions of the various state courts, especially as to a note which is given for a gambling transaction. In the State of Massachusetts, *Massachusetts Nat. Bank v. Snow*, 187 Mass. 160, it has been decided that the holder in due course of a promissory note payable to bearer acquires a good title to the note, even from one who has stolen it; and in the State of New York by repeated decisions the court holds that the holder acquiring the note before maturity in good faith and for value without notice of any infirmity, holds the same

free from any defect of title of prior parties and free from defences liable to prior parties among themselves, and may enforce the payment of the instrument for the full amount thereof against all parties liable thereon; and so the Supreme Court of the District of Columbia has held in the case of *Wirt v. Stubblefield*, 17 App. Cas. D. C. 283, that even though the note was given for a gambling debt, this defect in the title does not avail in the hands of a bona fide holder for value without notice, the court holding that this statute has repealed the statute of 16 Car. 2 Ch. 7 and 9 An. Ch. 14, and the court in that decision uses the following cogent language:

"We know, moreover, that the great and leading object of the act, not only with Congress, but with the large number of the principal commercial states of the Union that have adopted it, has been to establish a uniform system of law to govern negotiable instruments wherever they might circulate or be negotiated. It was not only uniformity of rules and principles that was designed, but to embody in a codified form, as fully as possible, all the law upon the subject, to avoid conflict of decisions, and the effect of mere local laws and usages that have heretofore prevailed. The great object sought to be accomplished by the enactment of the statute, was to free the negotiable instrument, as far as possible, from all latent or local infirmities that would otherwise inhere in it to the prejudice and disappointment of innocent holders as against all the parties to the instrument professedly bound thereby. This clearly could not be effected so long as the instrument was rendered absolutely null and void by local statute, as against the original maker or acceptor, as is the case by the operation, indeed by the express provision, of the statutes of Charles and Anne."

The State of Kentucky, however, holds otherwise and has decided in the case of *Alexander v. Hazelrigg*, 97 S. W. Rep. 353, and *Lawson v. First Nat. Bank*, 102 S. W. Rep. 324, that the section we have last referred to applies only to paper that might have been obligatory between the parties to it, and hence a holder in due course cannot recover upon a note given for a gambling debt, or given in violation of the statute respecting "Peddlers' Notes."

And now we have the State of West Virginia, in Twentieth

Street Bank *v.* Jacobs, 82 S. E. Rep. 320, holding that negotiable paper the consideration whereof is money lost or bet in gaming, is void in the hands of the holder, even though he took it for value and without notice of the character of the instrument. Judge Poffenberger, who delivers the opinion of the court, uses the following language:

"The effect claimed for these general provisions cannot be accorded them consistently with the rules and principles of construction of statutes. The Legislature was dealing, at the time of the passage of the act and in the passage thereof, with the matter of negotiability of paper which the law allowed men to put on the market and the courts to enforce. It was not then considering the subject of gaming to which it had previously given its careful attention, nor acting upon it. The act does not mention it, nor did any provision thereof suggest it to the legislative mind. Any presumption that any member of the Legislature, while considering or acting upon the bill, had the slightest suggestion or intimation from any of its terms that it would in any sense or to any degree, legalize gambling debts would be a most violent one. Nobody in reading the act, without having had the subject of gambling debts fixed in his mind at the time by some other than its terms, would likely discover the alleged opening for the use of paper expressly declared by law to be absolutely void in the hands of any and all persons, and appreciate at the same time the far-reaching effect of it. The partial legalization contended for would virtually destroy the previous statute, for every paper negotiable in form, taken for money lost or bet in gambling, would be made valid by the mere endorsement and delivery thereof to some person ignorant of the character of the consideration. Of course the Legislature never saw nor intended any such result.

"But if the suggestion of such a possibility did enter the legislative mind any time, there is a presumption in law that the law-making body relied upon a well-settled rule of construction, adopted by the courts for protection against it. That rule limits the operation of a statute to its subject-matter and general purpose, in the absence of a specific expression of intent and purpose to extend its operation to other subjects. Reeves *v.* Ross, 62 W. Va. 7, 57 S. E. 284; Coal & Coke Ry. Co. *v.* Conley & Avis, 67 W. Va. 129, 67 S. E. 613; Brown *v.* Gates, 15 W. Va. 131; Railroad Co. *v.*

Alexandria, 17 Grat. (Va.) 176; Grubb's Adm'r *v.* Sult, 32 Grat. (Va.) 203, 34 Am. Rep. 765; Cope *v.* De G. & J. 614; Hawkins *v.* Gathercole, 6 Dels. M. G., 1. Upon an exhaustive review of the subject this court has declared the following rule:

"In determining the meaning of a statute it will be presumed, in the absence of words therein specifically indicating the contrary, that the Legislature did not intend to innovate upon, unsettle, disregard, alter or violate: (1) The common law; (2) a general statute or system of statutory provisions, the entire subject-matter of which is not directly or necessarily involved in the act; (3) a right or exception based upon settled public policy; (4) the Constitution of the state; nor (5) the Constitution of the United States." Coal & Coke Ry. Co. *v.* Conley & Avis, cited.

"This rule, old as English jurisprudence and hoary with age, is deemed to have been within the knowledge of the Legislature, while acting upon the bill converted in law by the passage of chapter 81 of the Acts of 1907. State *v.* Harden, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394; Brown *v.* Turner, 174 Mass. 150, 54 N. E. 510; 36 Cyc. 1135. 'The Legislature is presumed to know the principles of statutory construction.' Lewis' Suth. Stat. Con., § 499.

"The decisions of courts of other states in which this rule has been overlooked or ignored in the construction of the statute (Schlesinger *v.* Gilhooly, 189 N. Y. 1, 81 N. E. 619, 12 Ann. Cas. 1138; Schlesinger *v.* Lehmaier, 191 N. Y. 69, 83 N. E. 657, 16 L. R. A. (N. S.) 626, 123 Am. St. Rep. 591; Bank *v.* Pick, 13 N. D. 74, 99 N. W. 63; Samson *v.* Ward, 147 Wis. 48, 132 N. W. 629; Arnd *v.* Sjoblom, 131 Wis. 642, 111 N. W. 666, 10 L. R. A. (N. S.) 842, 11 Ann. Cas. 1179; and Wirt *v.* Stubblefield, 17 App. D. C. 283), do not commend themselves to us and we decline to follow them. The two Kentucky cases relied upon by the plaintiff in error (Alexander *v.* Hazelrigg, 123 Ky. 677, 97 S. W. 353, and Lawson *v.* Bank (Ky.), 102 S. W. 324) embody the correct interpretation of the statute, in our opinion.

"Uniformity of construction of the new law is desirable, but it can be attained only by adherence to fundamental and cardinal rules of interpretation. Courts cannot be expected to lay them out of view for the sake of mere conformity with decisions that clearly violate them."

Against this somewhat remarkable view we can offer no stronger argument than that used by Mr. Justice Field of the Supreme Court of the United States in the case of *Cromwell v. County of Sac*, 96 U. S., page 60, as follows:

"We are of opinion that a purchaser of a negotiable security before maturity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against its maker, though he may have paid less than its par value, whatever may have been its original infirmity. We are aware of numerous decisions in conflict with this view of the law; but we think the sounder rule, and the one in consonance with the common understanding and usage of commerce, is that the purchaser at whatever price, takes the benefit of the entire obligation of the maker. Public securities and those of private corporations are constantly fluctuating in price in the market, one day being above par and the next below it, and often passing within short periods from one-half of their nominal to their full value. It would introduce, therefore, inconceivable confusion if bona fide purchasers in the market were restricted in their claims upon such securities to the sums they had paid for them. This rule in no respect impinges upon the doctrine that one who make a loan upon such paper, or takes it as collateral security for a precedent debt, may be limited in his recovery to the amount advanced or secured."

And we find that the States of Connecticut, Maryland, Tennessee and Oregon all agree with the New York rule and the rule laid down by the Supreme Court of the United States, in our judgment the only possible correct rule and one which ought to be adopted by all the courts. For the uniformity of the law in regard to negotiable instruments throughout the different States of this Union is a consummation most devoutly to be wished and we do not believe that the intent of any legislative body was to have this law as to its uniformity practically destroyed by judicial construction.

A kindly correspondent calls our attention to an apparent error committed by us in our editorial in the November number, and as we do not belong to the "infallible press" we are glad to confess error and call attention to our mistake, which after **We Hadn't Ought to (or "Auto") Have Done It.** all is not an entirely unnatural one. Section 3862 of the Code, to which we alluded, we may remind our correspondent, is not confined to horse-drawn vehicles. It merely contains the word "vehicles" and while it is true it speaks of "any driver," a chauffeur could very well be described as a driver; but automobiles and those meeting or overtaking them are governed by a different act—i. e., the Act approved March 17, 1910, to be found in Pollard's Code, page 965, which provides that when the operator of an automobile overtakes a vehicle and indicates his desire to pass said vehicle, it shall be the duty of the driver of the vehicle to bear to the right and decrease his speed to less than eight miles per hour so as to enable the automobile to pass at the left at a speed of not exceeding eight miles per hour. Any person failing to perform any of the duties imposed by this Act of March 17, 1910, is liable to a fine of not less than *ten* dollars, or imprisonment in jail not less than five nor more than thirty days, or both, in the discretion of the justice of the peace before whom the case is tried, with the right to an appeal to the circuit or hustings court.